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SOME LAND TITLE FACTS

The present article is a continuation of those appearing under the same caption in the November and December, 1923, issues of this Review. Accordingly, the reader is referred to these numbers to gather the thread of thought. The formation and boundaries of thirty counties of the state have been considered. It is the instant purpose to discuss the Depreciation and Donation Lands of the State, together with the counties in which they were laid out and in conclusion take up the formation and boundaries of the counties affected, likewise the few remaining counties not affected and not hitherto touched in the discussion.

At the close of the Revolutionary War, land specultaion was very common and the foundations of some of the present large family fortunes in this state were laid as a result of land deals. By treaties with the Indians the Commonwealth became the undisputed owner of vast tracts of wild land now constituting the richest portions of West-

ern Pennsylvania. In the searching of titles to lands in this section of the state the abstractors will frequently encounter the terms "Depreciation Lands" and "Donation Lands".

DEPRECIATION LANDS:

During the Revolutionary War, continental currency became sadly depreciated. In February, 1781 the difference between specie and script was in the ratio of 1 to 75. The saying common to this day was at this time coined, "not worth a continental". The Revolutionary soldiers had been paid in this depreciated currency and there was consequently great dissatisfaction among both officers and men. To placate these elements and to do justice to those who had made independence secure, the Pennsylvania Legislature passed the Act of December 18, 1780, Pa. St. at L. Vol. X, Page 233, wherein it was provided that these officers and men of Pennsylvania Line should be granted certificates specifying the sum due to them in specie.

It was further provided that these certificates should be receivable and considered as equal to specie in payment for vacant lands belonging to the state of Pennsylvania. Later the Act of the 12th of March, 1783, 2 Sm. L. 62; Pa. St. at L. Vol. XI, Page 32, carried out the thought of the Legislature further by stipulating that in payment of these certificates grants of land would be made in a certain tract of land lying in the South Western portion of the state, the boundaries which were described as follows:

> "Beginning where the western boundary of this state crosses the Ohio river; thence up the said river to Fort-Pitt; thence up the Allegheny river to the mouth of Mogulbughititon creek; thence by a west line to the western boundary of this state; thence south by said boundary to the place of beginning; reserving to the use of the state three thousand acres, in an oblong of not less than one mile in depth from the Allegheny and Ohio rivers, and extending

> up and down the said rivers, from opposite Fort Pitt, so far as may be necessary to include the same; and the further quantity of three thousand acres on the Ohio, and on both sides of the mouth of Beaver creek; including Fort Mackintosh."

In the Annual Report of the Secretary of Internal Affairs for the year 1892 a history of the section of the state known as the "Depreciation Lands" is given and in the Annual Report for the year 1893, at page 18A. the following reference is made:

"These lands were set apart by law, to be sold for the purpose of redeeming and paying the certificates of depreciation given to the officers and soldiers of the Pennsylvania Line, who served in the war of the revolution. The money had so depreciated on their hands as to be almost worthless as was the currency of the Southern Confederacy during the war of the Rebellion; but the people of Pennsylvania recognizing a duty they owed to the soldiers who assisted in achieving American Independence saw the necessity of redeeming this depreciated currency and by several acts of legislation provision was made for receiving it in payment for some of the wild lands in the western portion of the State. On account of the depreciated value of the money the lands given in exchange for it were then called, and have ever since been described as Depreciation Lands. We gave an extended description of these lands, together with a map showing their location to the north of the Ohio river and west of the Allegheny river in last year's report".

The counties in which the Depreciation Lands were located were: Allegheny, Armstrong, Beaver, and Lawrence.

DONATION LANDS:

In the Annual Report of the Secretary of Internal Affairs for the year 1893, at page 19A., appears the following statement:

"As early as the seventh day of March, 1780, while the war of the American revolution was still in active progress, and being vigorously waged by the hostile armies in the field, the General Assembly of Pennsylvania by resolution made a promise of "certain donations and quantities of land" to the soldiers of the State, known as the "Pennsylvania Line," then serving in the Federal Army. It was provided that these lands should be "surveyed and divided off" at the end of the war, and alloted to those entitled to receive them according to their several ranks. In order to comply with the letter and intention of the resolution of March, 1780, by the same act passed by the General Assembly March 12, 1783, in which it was provided that certain lands should be set apart and sold for the purpose of redeeming the certificates of depreciation given to the soldiers of the Pennsylvania Line, under the act of December 18, 1780, it was also provided that "a certain tract of country, beginning at the mouth of Mogulbughtiton creek; thence up the Allegheny river to the mouth of Cagnawaga creek; thence due north to the northern boundary of the State; thence west by said boundary, to the Northwest corner of the State; thence south, by the western boundary of the State, to the northwest corner of lands appropriated by this act for discharging the certificates herein mentioned; and thence by the same lands east to the place of beginning; which said tract of country shall be reserved and set apart for the only and sole use of fulfilling and carrying into execution the said resolve."

Under Section VI, of the same act, all rights titles or claims of land within the described bounds, whether obtained from the Indians, the late Proprietaries, or any other person or persons, were declared to be null and void, thus reserving the entire tract from sale or settlement until after the allotments of the soldiers were duly made and their claims fully satisfied. By Section VII, officers and privates were to be allowed two years after the declara-

tion of peace in which to make their applications, and in case of death occurring to any one before his application was made, an additional year was allowed to the heirs, executors or administrators of such person, and thereafter unlocated tracts were to be disposed of upon such terms as the Legislature might direct. It may be said in passing, however, that the period for making application was a number of times extended by subsequent legislation. By the last section of the act, Section VIII, non-commissioned officers and privates were prohibited from selling their shares of land appropriated to their use until after the same had been "actually surveyed and laid off", the act declaring such sales or conveyances absolutely null and void. In this last section of the act a distinction was made between the commissioned officers and the non-commissioned officers and privates, probably under an impression that the former were able to take better care of their interests than the latter. It will be observed that the territory thus set apart under the act of December 12, 1783 for donation purposes, comprises parts of the present counties of Lawrence, Butler, Armstrong, Venango, Forest and Warren, all of the counties of Mercer and Crawford, and that portion of Erie which lies south of the triangle. The territory was then a wild and unbroken wilderness, and we can at this day, after a century of progress and civilization, truly regard this section of our great Commonwealth, now filled as it is with a prosperous and industrious population that has wrought wonders of advancement and improvement, as a splendid, a princely domain, devoted in our early history to a noble purpose."

The allotment was arranged by the statute according to rank as follows:

To a Major General, two thousand acres; a Brigadier General, fifteen hundred acres; a Colonel, one thousand acres; a Lieutenant Colonel, eight hundred acres; a Surgeon, Chaplain or Major, six hundred acres; a Captain, five

hundred acres; a Lieutenant, four hundred acres; an Ensign or Regimental Surgeon's Mate, three hundred acres; a Sergeant, Sergeant Major or Quartermaster Sergeant, two hundred acres and a Drum-Major, Fife-Major, Drummer or Fifer or Private, two hundred acres.

Included among the names mentioned as entitled were those of Baron Steuben, who was to receive a grant equal to that of a Major General of the Pennsylvania Line and Lieutenant Colonel Tilghman, who was to receive a grant equal to that of a Lieutenant Colonel of the same line.

According to the report of William Irvine who was appointed agent of the lands so set aside, the extent running North and South was approximately 114 miles and the width running East and West approximately 50 miles. The domain was divided into ten donation districts and appropriate measures were taken for their survey. As has been stated this territory comprised parts of the present counties of Lawrence, Butler, Armstrong, Venango, Forest and Warren, all of the counties of Mercer and Crawford, and that portion of Erie county which lies south of the triangle. In the Annual Report of the Secretary of Internal Affairs for the year 1923, already referred to, there is embodied a map showing fully according to surveys the locations of the ten districts.

COUNTIES:

The counties of Allegheny and Washington, both embodied within the territory already described, were described in the preceding articles published in this Review in 1923. At this point, accordingly, the counties not hitherto described will be taken up in order.

Beaver, Butler, Mercer, Crawford, Erie, Warren, Venango and Armstrong counties were formed by the Act of 12th of March, 1800, 3 Sm. L. 421; Pa. St. at L. Vol. XVI, Page 454.

Beaver County was formed by Section I of the act from parts of the counties of Allegheny and Washington. The boundaries are as follows:

> "Beginning at the mouth of Big Sewickly creek on the Ohio river; thence up the said creek to the west line of Alexander's district of depreciation lands; thence northerly along the said line and continuing the same course to the north line of the first donation district; thence westerly along the said line to the western boundary of the state; thence southerly along the said boundary across the Ohio river to a point in the said boundary, from which a line to be run at right angle easterly will strike White's mill on Racoon creek, and from such point along the said easterly line to the said mill, leaving the said mill in the county of Beaver, thence on a straight line to the mouth of Big Sewickly creek, the place of beginning."

Butler County was formed by Section II of the act from a part of Allegheny county. The boundaries are as follows:

> "Beginning at the mouth of Buffalo creek on the Allegheny river; thence by a line running due west until it strikes the line of Beaver county; thence north by the line of said county to the northeast corner of said county; thence by a line north thirty-five degrees east fourteen miles; thence by a line running due east, continuing said course to where a line running due north from the mouth of Buffalo creek the place of beginning."

The Act of 5th of May, 1864, P. L. 826 provides as follows:

> "That the portion of the tract of land of Zerah B. Sheppard, of Parker township, Butler County, that lies in the county of Armstrong, be and the same is hereby included within the limits of the township of Parker, Butler County, and the boundary line of said county is so far changed as to include said tract of land."

Mercer county was formed by Section III of the act from a part of Allegheny county. The boundaries are as follows:

> "Beginning at the northeast corner of the county of Beaver; thence northeastwardly along the line of the county of Butler, to the corner of the said county of Butler, and of the county of Venango, herein after described; thence northerly on a line parellel to the western boundary of the state, to the north line of the fifth donation district; thence at a right angle along said line westwardly, to the western boundary of the state; thence southerly along the said boundary, to the northwest corner of the county of Beaver; thence easterly along the north boundary of the county of Beaver, to the place of beginning."

The line between Mercer and Crawford counties was altered by the Act of 28th March, 1808, 4 Sm. L. 535; Pa. St. at L. Vol. XVIII, Page 909. The line was established as follows:

> "Beginning at the northwest corner of a certain tract of donation land, known by its No. 1078, situate on the northwest corner of a section of the fifth donation district, thence southwardly by a tract of land on which Joseph Burson now resides, one hundred and fifty-four perches to a birch tree the southeast corner of the said tract, thence by the same westwardly to an ironwood-tree, the southeast corner of a tract of land on which Alexander Caldwell now resides, and thence on the same direction from the southeast corner of one tract to the southeast corner of the next, to the western boundary of the state, anything in any other law to the contrary notwithstanding."

Crawford County was formed by Section IV of the act from a part of Allegheny county. The boundaries are as follows:

> "Beginning at the northeast corner of Mercer county; thence upon a course north forty-five degrees east, till it intersects the north line of the sixth donation district; thence eastwardly along the said line ten miles; thence at a right angle to the said line northerly to the north line of the eighth donation district; thence westwardly along the said line to the western boundary of the state; thence southerly along the said boundary to the northwest corner of Mercer county; thence eastwardly along the north line of Mercer county, to the place of beginning."

The Act of 28th February 1822, 7 Sm. L. 501 alters the line between Crawford and Venango counties and fixes it as follows:

> "Beginning at the line dividing the counties of Crawford and Mercer at the Southwest corner of lot number one hundred and nine in the sixth donation district, thence north by the line of said number and number one hundred and ten to the north west corner thereof, thence east along the southern boundary of lots number twelve hundred eighty-three and twelve hundred eigty-two, to the south east corner of said last mentioned number, thence north along the division line of number twelve hundred eighty-two, and twelve hundred eighty-one to the northwest corner of said last mentioned number, thence east along the line dividing numbers twelve hundred eighty-two, thirteen hundred, thirteen hundred two, to the southwest corner of lot number twelve hundred sixty-six, thence along the line dividing numbers thirteen hundred two and twelve hundred sixty-six, to the north west corner of said last mentioned numbers, thence east to the southwest corner of lot number twelve hundred fifty-eight, thence north to the northwest corner of number twelve hundred thirty-five, thence north to the northwest corner of said last mentioned lot, thence east to the southwest corner of number twelve hundred twenty-four, thence north to the northwest corner of said number twelve hundred and twenty-four thence east to the southwest corner of number twelve hundred and twenty, thence north to the northwest corner of said number twelve hundred and twenty, thence east to the north east corner of lots number one hundred and five, thence northwestwardly to the northwest corner of number eleven hundred sixty-two, thence north eastwardly to the south east corner of lot number eleven hundred and ninety-nine, thence north to the north east corner of said last mentioned numbers, thence east to the south east corner of number twelve hundred and ten, thence north eastwardly to the southeast corner of a tract of land claimed by James Luce, thence north to the northeast corner of said James Luce's tract, thence east the length of three tracts of warranted lands formerly the property of the Holland Land Company, and warranted in the names of Richard Gill, Samuel Gill and Peter Gill, to the southeast corner of said tract warranted in the name of Peter Gill, thence a continuation of the same line east

> across a small strip of vacant land in the name of Daniel M'Combs numbered twelve, thence east the length of eight tracts of settlement lands to the south east corner of the eighth tract numbered eighty-four, and warranted in the name of Moses Long, to where the said line intersects the line of Crawford and Warren counties."

The Borough of Jamestown in the county of Mercer was incorporated by the Act of 20th April, 1853, P. L. 625. This act annexes a part of Crawford County to Mercer, the borough limits being as follows:

> "A territory lying in the township of South Shenango, Crawford county, and Greene township, Mercer County, to include the village of Jamestown, to commence at the centre of the Jamestown and Greenville road, between the lands of Thomas Moorland and Heirs of William Dowling; thence east along the south line of lands of said Dowling heirs, James Campbell and James M'Kinley, along the tract line to the Crawford and Mercer county line; and from thence due north in a direct line to a point due east from the centre of a road leading from William Dowthett's; thence west along the centre of said east and west road, in a direct line to a point due north from the point of starting; due from thence due south to the place of beginning."

A supplement to this act passed 18th April, 1864, P. L. 464 provides:

> "That the North-eastern line of the borough limits, of the borough of Jamestown, be changed, so as to extend from Mercer and Crawford line, north, along the west line of the Gambell tract, to intersect the present north line of the borough, and that the Gambell tract be returned back into South Shenango, Crawford county."

See Mercer county for changes of boundaries between Mercer and Crawford counties.

Erie County was formed by Section V of the act from a part of Allegheny county. The boundaries are as follows:

> "Beginning at the northeast corner of Crawford county; thence at a right angle with the north boundary of the same northerly till it shall intersect the line of the state of

> New York; thence westwardly along the said line to the southwest corner of the said state; thence northerly by the line of the said state into Lake Erie; thence southwestwardly by the said Lake, including so much thereof as is within the jurisdiction of Pennsylvania, until it shall intersect the aforesaid western boundary of the state; thence southerly by the said boundary to the northwest corner of Crawford county; thence along the north line of the said county to the place of beginning."

Warren County was formed by Section VI of the act from parts of Allegheny and Lycoming counties. The boundaries are as follows:

> "Beginning at the southeast corner of Crawford county, in the north line of the sixth donation district; thence the course of the said line eastwardly across the Allegheny river, until it shall intersect the line dividing Johnston's and Potter's districts, in the county of Lycoming; thence northerly along the said line to the line of the state of New York; thence westwardly along the line of the said state, to the corner of Erie county; thence southerly by the eastern boundaries of the counties of Erie and Crawford, to the place of beginning."

Section 12 of the Act of 8th April, 1833, P. L. 222, provides the northern part of the division line between Warren and McKean counties shall be as follows:

> "Commencing on the New York state line where the Allegheny river enters the state of Pennsylvania, between the counties aforesaid, thence following along the margin of the east bank of the said river, as the same has heretofore been run and surveyed by the commissioners appointed for that purpose, down the same, opposite where the north and south line dividing said counties now leaves the said river, to pursue a direct course, being a distance of about eight miles from the said New York state line, and that the jurisdiction over the territory on each side of the centre of the main channel of the said river as aforesaid, shall attach to the said counties respectively."

The Act of 16th April, 1845, P. L. 541 provides for running and marking the boundary between Warren and

McKean counties as follows:

> "That the said line shall commence on the north and south line of the east side on tract number three thousand seven hundred and forty, in Corydon township, M'Kean County, and run as near as may be in order to make the line reasonably straight along the back line of the river tier of tracts, so as to intersect the line dividing the said counties of Warren and M'Kean within one mile of the Western side of the Kinuza creek."

Venango County was formed by Section VII of the act from parts of Allegheny and Lycoming counties. The boundaries are as follows:

> "Beginning at the northeast corner of Mercer county; thence on the first line or course of Crawford county, until it shall intersect the north line of the sixth donation district, being the same as the first line of the said county of Crawford; thence eastwardly upon the sand line of the sixth donation district, along the boundary of the counties of Crawford and Warren, and crossing the river Allegheny to the line dividing Woods and Hamilton's districts, in the county of Lycoming; thence southerly along the said line to Toby's creek; thence down the said creek to the river Allegheny; thence across the said river and upon the line of Armstrong county hereinafter described, to the northeast corner of tthe county of Butler; thence westwardly by the north line of the said county to the corner of Mercer county; thence northerly along the line of Mercer county to the place of beginning."

The Act of 7th February 1832, P. L. 53 provides that the line run and marked by Richard Irwin, Esq., shall be the boundary between Venango and Jefferson counties.

The Act of 6th April, 1854, P. L. 303 provides:

> "That so much of the division line between the counties of Clarion and Venango, as runs through the farm belonging to, or in the possession of James F. Agnew, shall be changed as to embrace and include the whole of said farm in the county of Venango; and all that part of the said farm now in the county of Clarion; shall be and is hereby attached to the county of Venango."

See Crawford county for change of boundary between Crawford and Venango counties.

Armstrong county was formed by Section VIII of the act from parts of Allegheny, Lycoming and Westmoreland counties. The boundaries are as follows:

> "Beginning on the Allegheny river, at the mouth of Buffalo creek, the corner of Butler county; thence northerly along the line of the said county of Butler, to the northeast corner of the same supposed to be at the Allegheny river, and if the northeast corner of the said county of Butler shall not strike the Allegheny river, them from the said corner on a line at a right angle from the first line of the county of Butler, until the said line shall strike the Allegheny river; thence by the western margin of the said river to the mouth of Toby's creek; thence crossing the river and up the said creek to the line dividing Woods and Hamilton's districts; thence southerly along the said line to the present line of Westmoreland county; thence south thirty-five degrees west to the Kiskiminitas river; thence down the said river to the westwardly margin thereof; thence down the said river to the mouth of Buffalo creek, the corner of Butler county, the place of beginning."

Indiana County was formed from parts of Westmoreland and Lycoming counties by an act passed 30th March, 1803, 4 Sm. L. 83; Pa. St. at L. Vol. XVII, Page 434. The boundaries were as follows:

> "Beginning at the corner of Armstrong county on the Kiskiminitas river; thence up said river to the mouth of Conomauch river; thence up said river to the line of Somerset county; thence a straight line to the Canoe-place on the west branch of the Susquehanna; thence a north course along Potter's district line twelve miles; thence a due west course of Armstrong county line; thence along said line to the place of beginning."

Section 64 of the Act of 14th April, 1840, P. L. 336 provides:

> "That the division line between the counties of Indiana and Cambria, as run and marked by Henry J. M'Guire, in the month of July, one thousand eight hundred and thirty-

nine, a draft of which division line so run is filed in the commissioners office of said counties, which division line bears south twenty degrees and twenty-five minutes, west twenty-four miles and forty perches from the cherry tree or canoe place to the Conemaugh river, shall be established and fully confirmed by this act as the division line between the said counties."

The Act of 25th February, 1850, P. L. 99 provides:

"That the sixty-seventh section of the act to which this is a supplement, shall not be so construed so as to interfere, or in any way affect the title to, or boundary lines of any lands that may have been located near the line mentioned in said section, or bounded on the old county line between Indiana and Cambria counties, previous to the passage of the act to which this is a supplement."

The Act of 30th April, 1855, P. L. 372, erecting Cherry Tree into a borough provides:

That all those parts of the counties of Indiana, Cambria and Clearfield lying and being in the following boundaries, to wit:: Beginning at tthe north end of the bridge across Cushion creek, on the Indiana road, in Green township, Indiana County; running thence in a northerly direction, in a straight line, to the south-east corner of James Patrick's land, on the purchase line, and thence along the east line of said Patrick's land to the north-east corner thereof, adjoining the line of John Eason, in Montgomery township; thence north fifteen degrees east until it intersects the Mahoning road, on the north line of John Eason's farm, and continue on in the same direction ten rods to a post on the premises of Parsons Coe; thence running easterly in a straight line, across tthe Indiana and Clearfield county line to the northeast corner of the town of New Lancaster, in Burnside township, Clearfield county; thence south twelve degrees east along the eastern line of said town, and continuing in the same direction across the Cambria county line, until it intersects the Hollidaysburg road near the house of D. K. Kinports, in Cambria county; thence due west to the Susquehanna river, in same county, and thence in a straight line to place of beginning, be and the same is hereby erected into a borough to be called Cherry Tree."

"That all those portions of the above described bound-

> aries, lying within the counties of Clearfield and Cambria, be and the same are hereby detached from the said counties, and attached and annexed to the county of Indiana."

Jefferson, McKean, Clearfield, Potter, Tioga and Cambria counties were formed by the act of 26th March, 4 Sm. L. 170; P. St. at L. Vol. XVII, Page 679.

Jefferson County was formed by Section I of the act from a part of Lycoming county. The boundaries were as follows:

> "Beginning at the northeast corner of Venango county, and thence east thirty miles (Part along the line of Warren County) and thence by a due south line of fifteen miles, thence a southwesterly course to Sandy-lick creek, where Hunter's district line crosses said creek; thence south along Hunter's district line to a point twelve miles north of the canoe place, on the west branch of Susquehanna; thence a due west line until it intersects the eastern boundary of Armstrong county; thence north along the line of Armstrong and Venango counties, to the place of beginning."

The Act of 7th February, 1832, P. L. 53 provides that the line run and marked by Richard Irwin, Esq., should be the boundary between Jefferson and Venango counties.

The Act of 4th April, 1868, P. L. 651 annexes the following portion of Clearfield county to Jefferson:

McKean County was formed by Section II of the act from a part of Lycoming county. The boundaries were as follows:

> "Beginning at a point on the line between the counties of Clearfield and Jefferson, where the road from Brookville to Ridgway crosses the same, and thence south to the line of tracts numbers forty-two hundred and forty-one and forty-two hundred and forty-two; thence east by said line to the corner of tracts numbers forty-two hundred and forty-two, and forty-two hundred and forty-one, forty-one hundred and eighty-eight and forty-two hundred; thence south by line of tracts numbers forty-two hundred and forty-one, and forty-two hundred, and forty-two hundred and thirty-eight, and forty-two hundred and seventy-five, to the line between Huston and Fox townships; thence by said

township line to the Jefferson county line, and thence by said county line to the place of beginning, shall be and it is hereby annexed to and made to form a part of the county Jefferson."

The Act of 24th February, 1847, P. L. 147 provides that the line to be run between Warren and McKean counties as provided for in the Act of 1845 should be run so that the entire tract of land of O. L. Stanton should be in McKean county.

See Warren county for line between Warren and McKean counties.

"Beginning at the southeast corner of Warren county; thence east along the line of Jefferson county to the northeast corner thereof; thence south along the line of Jefferson county fifteen miles; thence east twenty-two miles; thence north to the state line; thence west along the line of Warren county to the place of beginning."

Clearfield county was formed by Section III of the act from a part of Lycoming county. The boundaries were as follows:

"Beginning where the line dividing Cannon's and Brodhead's district strikes the west branch of Susquehanna river; thence north along the said district line until a due west course from thence will strike the southeast corner of M'Kean county to the line of Jefferson county; thence southwesterly along the line of Jefferson county, to where Hunter's district line crosses Sandy-lick creek; thence south along the district line to the canoe place on Susquehanna river; thence an easterly course to the southwesterly corner of Centre county, on the heads of Mushanon creek; thence down the west branch of Susquehanna river to the place of beginning."

The Act of 1st April, 1823, 8 Sm. L. 176, annexed part of Lycoming county to Clearfield as follows:

"That the deputy surveyor of Clearfield county be authorized and required to run a line from the mouth of the second run, emptying into the west branch of the Susquehanna, from the north side, below Buttermilch falls,

> at the true bearing of north thirty-five degrees west until it intersects the present county line, between the counties of Lycoming and Clearfield, and so much as may be cut off from Lycoming county, by the line so run, shall be added to the county of Clearfield."

Potter County was formed by Section IV of the act from a part of Lycoming county. The boundaries were as follows:

> "Beginning five miles north of the southeast corner of M'Kean county, thence east thirty miles to Brodhead's easterly district line; thence north along said district line to the state line; thence west along the state line to the northeast corner of M'Kean county; thence south along the line of M'Kean county to the place of beginning.'

Tioga County was formed by Section V of the act from a part of Lycoming county. The boundaries were as follows:

> "Beginning five miles north of the southeast corner of number four on Brodhead's district line on the eastern boundary of said number four, thence due east until it strikes the main branch of Lycoming creek; thence up the said creek to the head thereof, near the Towandy beaver dams; thence to the head of said beaver dams, or until it intersects the boundary line between Luzerne and Lycoming counties; thence a straight line to the eighty mile stone of the state line; thence west along the state line to the northeast corner of Potter county; thence south along the line of the same to the place of beginning."

Cambria County was formed by Section VI of the act from parts of Huntingdon and Somerset Counties. The boundaries were as follows:

> "Beginning at the Conemaugh river, at the southeast corner of Indiana County; thence a straight line to the canoe place on the west branch of Susquehanna; thence easterly along the line of Clearfield county to the southwesterly corner of Centre county, on the heads of Mushanon creek; thence southerly along the Allegheny mountain to Somerset and Bedford counties about seventeen miles, until a due west course from thence will strike the main branch

> of Paint Creek; thence down said creek the different courses thereof, till it empties into Stony Creek; thence down Stony creek the different courses to the mouth of Mill creek; thence a due west line till it intersects the line of Somerset and Westmoreland counties; thence northerly along the said line to the place of beginning."

For line between Cambria and Indiana counties, see Indiana county.

A supplement to this act passed 25th February, 1850, P. L. 99 provides:

> "That the sixty-seventh section of the act to which this is a supplement, shall not be so construed so as to interfere, or in any way affect the title to, or boundary lines of any lands that may have been located near the line mentioned in said section, or bounded on the old county line between Indiana and Cambria counties, previous to the passage of the act to which this is a supplement."

Bradford (Ontario) and Susquehanna counties were formed by the Act of 21st February, 1810, 5 Sm. L. 89:

Ontario County was formed by Section I of the act from parts of Luzerne and Lycoming counties. The boundaries were as follows:

> "Beginning at the fortieth mile stone, standing on the north line of the state, and running south to a point due east of the head of Wyalusing falls, in the river Susquehanna; thence southwesterly to the nearest point of Lycoming county line; thence in a direct line to the southeast corner of Tioga county, at the Beaver dam on Towanda creek; thence northerly along the east line of Tioga county, to the eightieth mile stone, standing on the north line of the state; thence east along said line to the fortieth mile stone, the place of beginning."

The Act of 28th March, 1811, 5 Sm. L. 219, establishes the southern boundary of Ontario county as follows:

> "The trustees of the county of Ontario are hereby authorized and required to establish a point east of the Slippery Rocks, (so called) at the head of Wyalusing falls in the river of Susquehanna, for the southeast corner of

> Ontario county; from thence a line west to the said Slippery Rocks; from thence a southwesterly course to the nearest point of Lycoming county, is hereby established as a southern boundary of the said county."

The name Ontario county was changed to Bradford by Section I of tthe act of 24th March, 1812, 5 Sm. L. 354.

Susquehanna county was formed by Section II of the act from a part of the county of Luzerne. The boundaries were as follows:

> "Beginning at the fortieth mile-stone standing on the north line of the state, and running south along the east line of Ontario county, to a point due east of the head of Wyalusing falls in the river Susquehanna; thence due east to the western line of Wayne county; thence northerly along the said western line of Wayne county, to the aforesaid north line of the state; and thence west along the said state line to the fortieth mile stone, the place of beginning."

Schuylkill county was formed from parts of Berks and Northampton counties by an act passed 1st March, 1811, 5 Sm. L. 201. The boundaries were as follows:

> "That all that part of Berks county lying and being within the limits of the following townships, to wit: The townships of Brunswick, Schuylkill, Manhein, Norwigian, Upper Mahantango, Lower Mahantango and Pine Grove, in Berks county, and the townships of West Penn and Rush, in Northampton county, shall be, and the same are hereby, according to their present lines, declared to be erected into a county."

An Act passed 3rd March, 1818, 7 Sm. L. 59 annexed the following parts of Columbia and Luzerne counties to Schuylkill county and formed Union township therefrom:

> "Beginning at a corner in the line dividing the county of Columbia from the county of Schuylkill; thence extending through the township of Catawissa, north ten degrees, east four miles and a half to a pine tree on the little mount; thence extending through the townships of Catawissa and Mifflin north forty-five degrees, east five miles to a stone

> on Bucks mount, and in a line dividing the county of Columbia from the county of Luzerne; thence through the township of Sugar Loaf, in the county of Luzerne, south seventy degrees, east eight miles to the line between the county of Columbia and the county of Schuylkill to the place of beginning."

The act of 6th of March, 1843, P. L. 98, defines and fixed the line between Schuylkill and Berks counties as follows:

> "Beginning at a pine tree corner in the present county line on the top of the Blue mountains, and corner of East Brownsville township, in the county of Schuylkill, and Albany township in the county of Berks; thence eastwardly in a straight line to the present corner dividing the counties of Berks, Schuylkill and Lehigh."

Section 6 of the Act of 29th March, 1849, P. L. 260 provides that the boundary between Berks and Schuylkill counties shall be as follows:

> "Beginning at a pine tree, a corner in the present county line, on the top of the Blue mountain, and corner of old Brunswick township, in Schuylkill county, and Albany township, in Berks county; thence south degrees west in a straight line to the spring, at the old dug road, now the Centre turnpike, about one and a half miles below Port Clinton, known to be the corner dividing the counties of Schuylkill and Berks."

Lehigh County was formed from a part of Northampton county by an act passed 6th of March, 1812, 5 Sm. L. 304. The boundaries were as follows:

> "All that part of Northampton county, lying and being within the limits of the following townships, to wit: The townships of Lynn, Heidleburg, Lowhill, Wissenburg, Macungie, Upper Milford, South Whitehall, North Whitehall, Northampton, Salisburg, Upper Saucon, and that part of Hanover within the following bounds, to wit: Beginning at the Bethlehem line, where it joins the river Lehigh, thence along the said line until it intersects the road leading from Bethlehem to the Lehigh water gap, thence along said

road to Allen township line, thence along the line of Allen township, westwardly, to the Lehigh."

Lebanon county was formed from parts of Dauphin and Lancaster counties by an act passed 16th of February, 1813 6 Sm. L. 17. The boundaries were as follows:

"Beginning at the southeast corner of Dauphin county where it intersects the Berks county line, about four miles from Newmanstown thence through Lancaster county, to a sand-stone house, formerly occupied by George Wyman, and including the same on the great road leading from Shaefferstown to Elizabeth Furnace; thence to a house formerly occupied by one Shroyer, deceased, and including the same on the great road leading from Lebanon to Manheim; thence to Snyder's mill on Conewago creek, excluding the same; thence northerly to the house of one Henry, at the cross roads leading from Harrisburg to Reading, including the same; thence to Racoon creek on the Blue of Kittatiny mountain; thence along the said mountain on the top thereof, to the Berks county line; thence along the said line to the place of beginning."

The act of 29th of March, 1821, 7 Sm. L. 425, annexed "So much of the townships of east Hanover and Bethel, in the county of Dauphin as is north of the Blue or Kittatinny mountain" to Lebanon county

The Act of 23rd March, 1829, P. L. 101 provides for marking part of the lines between Dauphin and Lebanon counties as follows:

"Beginning at the end of the division line between the said counties, running from Andrew Henry's house, near Palmyra, in the county of Lebanon, to the top of the Blue mountain, thence continuing the said line by the same course to the top of the fourth ridge of the Blue Mountain, and from thence a northeasterly course along the top of said ridge to the Schuylkill county line.'

(To Be Continued In Next Issue)

MOOT COURT

N. WALLACE, by his next friend, C. WALLACE vs. CROSS

Landowners—Duty to Infant Trespassers—Attractive Nuisance—Proximate Cause

STATEMENT OF FACTS

The defendant was the owner of an uncompleted building in the course of construction adjacent to a street. Four boys, playing "Fox and Hounds" entered the building through an unfastened door. One of the "Hounds" in following the "Fox" stepped into an uncovered hole in the floor and broke his leg. His father, as next friend of his 13 year old son, sues for the injuries to the boy and in his own right for the medical expenses.

Prager, for Plaintiff.

Robertson, for Defendant.

OPINION OF THE COURT

McLaughlin, J. This case presents a question upon which there is much conflict, namely, the duty owed by a landowner to an infant trespasser. The specific case is whether the owner of an uncompleted building, adjacent to a highway, is liable for injuries to an infant trespasser.

The general rule is that the mere fact a trespasser is a child will not create or impose on the owner of property any duty to keep his premises safe. 29 Cyc. 445, 446, Mitchell vs. Phila. W. & B. Ry. Co. 132 Pa. 226. This rule is recognized in Pennsylvania, but with two exceptions. First: a landowner cannot inflict wanton or wilful injury upon a child trespasser. Second: if the land has been used as a playground by children he owes them a duty to keep his premises in a safe condition. Summarizing the Pennsylvania doctrine, it is—that a landowner is under no duty to trespassing children, who may be attracted to his land by something thereon, or those who habitually make a playground of his property, other than to refrain

from wilful or wanton injury. Gillespie vs. McGowan 103 Pa. 144, Fitzpatrick vs. Penfield 267 Pa. 564.

In the United States the question of duty to infant trespassers has been frequently litigated. The case from which much of the controversy has arisen was, Sioux City & P. R. Co. vs. Stout, 17 Wall 657. This famous case laid down the attractive nuisance or turntable doctrine. The defendants in that case were held liable to an infant trespasser who was injured by a turntable situated on the defendant's land; the court basing its opinion on the attractiveness of a turntable and that defendant was negligent in not forseeing the danger of children, therefore owing them a duty to have his premises in a safe condition.

But this doctrine has been expressly repudiated in many states and among them Pennsylvania. In Thompson vs. B. & O. R. R., 218 Pa. 444, where the facts are analagous to R. R. vs. Stout, (infra) these words emanating from Justice Fell state the Pennsylvania law clearly—"the railroad owed him the duty not to injure him intentionally, but it was under no duty actively to take care of him either by keeping him out of the yard or by protecting him after he had entered. There was no negligence unless there was a breach of duty". The court held as a matter of law that there was no duty. The eminent justice said to impose such a duty would subject a landowner to a restraint upon the beneficial use of his land with which we entirely concur.

Learned counsel for plaintiff cite as authority Hydraulic Iron Works Co. vs. Orr, 83 Pa. 332, where a landowner was held liable. In that case the defendant had on his premises, close to a public highway and in a large city, a trap door which was lowered for receiving freight. The door was unfastened, fell and injured a child. But this case can be distinguished, as pointed out in Gillespie vs. McGowan, 100 Pa. 144—"In Hydraulic Works case there was a recklessness that may be said to partake of wantonness, the case was decided upon its own peculiar facts; the defendant maintained a deadly trap on his premises which closely resembled the spring gun cases". This case decided on its peculiar facts is no precedent in Pennsylvania.

Another case cited as authority by learned counsel for plaintiff is U. P. R. R. vs. McDonald, 152 U. S. 262. There a child was frightened, started to run along a path, fell into a slack pile and was burned. This case can also be distinguished. The court held that the child was not a trespasser under the circumstances, and the company was guilty of negligence, not because they owed the child a duty, but there was a statutory requirement that slack piles must be fenced

and they were negligent in not fencing.

The plaintiff contends that defendant was negligent as he could have anticipated that the premises would be used as a playground. Also that he should have fastened the door in some manner. To hold this would be to revolutionize the whole law of Pennsylvania, pertaining to this subject. Gillespie vs. McGowan (infra) went so far as to hold that a landowner who had an open well on his land one hundred feet from the highway and no fence on his land, owed no duty, and this case has been consistently followed by a long line of decisions. So upon what precedents are we to base such a contention? Furthermore such a holding is against all plain principles of right and justice, for it would necessarily follow that in every step of building construction a landowner would have to board up his premises or maintain guards to keep children from playing in an uncompleted house. Such reasoning would place an absolute liability on a landowner, beside causing added expense in building and the ultimate result would be a retardation of building activities.

Justice Holmes, that erudite justice for whose reasoning we have the most profound respect, in United Zinc & Chemical Co. vs. Van Britt, 258 U. S. 268 says—"there must be a ground for anticipating trespassing children before any duty to safeguard them arises or where the landowner has directly or by implication invited children trespassers there". When a man builds a house, does he invite children trespassers? Of course if one wishes to extend their imagination they might forsee that children do many things. We can foresee that boys will climb fruit trees or swim in ponds, but must a landowner cut down his fruit trees or drain his pond because they might fall from the branches of the tree or be drowned in the pond?

Wallace vs. Pettit, 25 Ontario W. N. 364 is a case where the facts are silent as to whether the building adjoined the highway. Gillespie vs. McGowan (the well case, infra) leads us to the conclusion that this added fact cannot change the result and the defendant should be held not liable, as did the Ontario case.

Counsel for plaintiff cite as authority Schermerhorn on Torts 335. But counsel have not quoted him fully or inadvertently neglected to examine their authority. Page 334 says—"the courts are much more inclined to impose liability where the apparatus causing harm is of a kind naturally attractive to young children and where the defendant has notice of their propensity to play with it, (and when we have the added element that that which causes the harm though on defendant's land, is close to the highway, the weight of authority favors liability)". The portion in italics was cited, which standing alone is incomplete and no authority.

Late Pennsylvania cases have reiterated the doctrine of Gillespie vs. McGowan, (infra) and have overruled Hydraulic Iron Works Co. vs. Orr (infra). Zamarie vs. Dans, 284 Pa. 523, Hojecki vs. P. & R. R. R. 283 Pa. 444.

Since the plaintiff's case does not come within any of the named exceptions, and the weight of authority in Pennsylvania is overwhelmingly against him, we must give judgment for defendant.

While the courts have given little attention to the age of the trespasser in these cases we think the age should be considered. In this case the trespasser was thirteen years old and unless he was of inferior intelligence he certainly was of sufficient maturity to be denied recovery. We do not wish to be interpreted as partly basing our decision on this point. The question of his intelligence is appropriately a question to be decided by the jury and it is for them to decide whether the age would or would not preclude recovery. 20 R. C. L. 87, Shea vs. Gurney 163 Mass 184, 39 N. E. 996.

OPINION OF SUPREME COURT

The learned court below has correctly ruled that Pennsylvania has repudiated the "attractive nuisance" theory of liability to infant trespassers. Even where this doctrine is in force there would be considerable difficulty in allowing a recovery for it would seem that the child was solely attracted by the desire to capture the "fox" rather than by the attractiveness of a partly constructed building.

Consequently, the judgment of the learned court below is affirmed on the authorities cited in its opinion.

BYER VS. SELLER

Contract For Sale of Land—Specific Performance—Written Contracts Statute of Frauds—Agency—Parol Authority—Ratification

STATEMENT OF FACTS

Seller, vendor, and Byer, vendee, made a contract for the sale of a lot by telephone and Seller authorized Byer to make out a written memorandum and to sign Seller's name to it. Byer made the memorandum, embodying all the terms of the contract, signed the names of each, and read it carefully over the phone to Seller, who approved the instrument as executed. Seller refused to perform and Byer brings this bill for specific performance.

Late Pennsylvania cases have reiterated the doctrine of Gillespie vs. McGowan, (infra) and have overruled Hydraulic Iron Works Co. vs. Orr (infra). Zamarie vs. Dans, 284 Pa. 523, Hojecki vs. P. & R. R. R. 283 Pa. 444.

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C. Blitz, for Plaintiff.
M. Cohen, for Defendant.

OPINION OF THE COURT

Hyman, J. The case at bar resolves itself into this main query, "whether the vendee may secure specific performance from the vendor whose agent signed the contract under parol authority."

In answer to this question, the law in Pennsylvania is very definite and abundant. The case comes under the purview of the Statute of Frauds and Perjuries, Act of March 21, 1772, sec. 1, 2 Purdon 1753. That act provides that, "all leases, estates, interests of freehold or term of years or any uncertain interest of, in or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only or by parol, and not put in writing and signed by the party so making or creating the same or their agents, **thereunto lawfully authorized by writing,** shall have the force and effect of leases or estates at will * * * * only and shall not either in law or equity be deemed or taken to have any other or greater force or effect." And sec. 2. "No estate or interest in land shall be assigned, granted or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same, or their agents **thereunto lawfully authorized by writing."**

Therefore, even if we assume that the plaintiff was the agent for the defendant in this transaction the plaintiff cannot exhibit any writing showing the defendant's authorization to sign the contract. Surely not, for the defendant never signed such an authorization. It is true, that the defendant authorized him orally to sign, but the plaintiff can only prove this by oral testimony and this is prevented by the Statute of Frauds. This was shown in the case of Lewis vs. Bradford, 10 Watts 67, in which the proposition of law was laid down, "that a power to sell land cannot be established by parol."

In support of the defendant's contention we have been referred to Llwellyn vs. Sunnyside Coal Co., 242 Pa. 517 and the rule there is conclusive against the plaintiff. Justice Stewart points out that the requirements of the Statute of Frauds that contracts for the sale of land shall be in writing, can be met only by proof in writing of the complete contract.

It would be in vain for the Statute to declare that the agency should originally be constituted in writing, if courts of law should hold that a subsequent parol recognition of the acts of the agent, not constituted originally in writing, would satify the law. This would only require the form of perjury to be changed to accomplish all the evil the law deprecates. Other authorities in Pennsylvania which

enunciate the doctrine laid down, "that to enable the vendee to secure specific performance of a contract for the sale of land, made by an agent of the vendor it is necessary that the agent's authority be in writing" are ably illustrated in the cases of McClintock vs. South Penn Oil Co., 146 Pa. 144, and in Twitchell vs. City of Philadelphia 33 Pa. 212.

The plaintiff argues that even tho the principal and agent are at the end of a telephone, for all practical purposes, it is just as if they were together and there is no agency involved since the instrument is signed in the vendor's presence takes it out of the Statute. However, we cannot sustain this view. Theoretically it might work but in the practical business world today it is rather difficult to see how integrity and business standards can be unassailed. There certainly is an enormous amount of room for fraud and unfair business dealing if such were the law. That is the reason we specifically have the Statute of Frauds enforced in Pennsylvania at the present time.

In the case before us, however, the element of the adoption of the signature is present and it is argued that this may possibly satisfy the statute without reference to any question of agency. But Pennsylvania decisions have uniformly held that while a contract by an agent without written authority may be made valid by subsequent ratification, that ratification must be in writing. See Van Horn vs. Frick, 6 S. & R. 90, Mechem's Agency, 2nd Ed. 180; McClintock vs. South Penn Oil Co. Supra.

It would be useless to decide upon any other questions which might arise since the court has decided that the propositions of law set forth above prevent the recovery of the plaintiff and we render judgment in the defendant's favor.

OPINION OF SUPREME COURT

The learned court below has correctly decided that the present bill cannot be supported on the theory of agency. Not only is the adverse party disqualified, by reason of his interest, from being the agent of the vendor, but his authorization has been parol only and written authority is necessary to enable an agent to make a specifically enforcible contract for the sale of realty, Llwellyn vs. Sunnyside Coal Co., 242 Pa. 17. Ratification of such a contract must also be in writing, Van Horn vs. Frick, 6 S. & R. 90.

The signing of Byer was not the act of Seller. The principal that parol authority is sufficient authorization to sign the name of another in his presence cannot be extended to cases where there is no actual physical presence of both parties.

The judgment of the learned court below is affirmed.

BRONSON VS. C. MOUNT

Evidence—Attorney and Client—Privileged Communications Act of May 23rd, 1887, P. L. 158

STATEMENT OF FACTS

Clyde consulted his lawyer in regard to entering into a contract with Bronson. Later Bronson sued Mount and the statement Clyde made to his lawyer became material evidence. Bronson put Clyde's lawyer on the stand and asked what statements Clyde had made to him. The defendant objected that it was a privileged communication. The court over-ruled the objection and the lawyer testified. Verdict and judgment for the plaintiff and the defendant appeals.

Kauffman, for Plaintiff.

Walls, for Defendant.

OPINION OF THE COURT

Hurwitz, J. The fundamental codification of the law of evidence in Pennsylvania is the Act of May 23rd, 1887, P. L. 158. Sec. 5, Clause d of which act provides: "In any civil proceeding * * * * nor shall counsel be competent or permitted to testify to confidential communications made to him by his client or the client be compelled to disclose the same, unless in either case this privilege be waived upon the trial by the client."

Unfortunately however, in spite of this forty year old act there is but one case (Haller's Estate, 56 Superior 48) in all the decisions in Pennsylvania which construes Section 5, Clause d, and that case throws no light on the question in the case at bar.

The true question in this case is precisely stated by counsel for plaintiff: Can one who is not a client of the attorney who is testifying, object on the ground of privileged communication as to statements made to him by a client, who is not a party to the suit.

Fortunately Dr. William Trickett on Page 2 of his valuable work "The Law of Witnesses in Pennsylvania" sheds much light on the matter. In reference to this section of the Act of 1887, P. L. 158, he says, "The immunity thus declared was recognized by the common law, nor is it probable that any changes in that law are intended to be made by this section of the Act."

The answer to our problem then depends upon: What is the common law rule on this subject in Pennsylvania.

In answer to this problem Wigmore Vol. 5, Sec. 2321 says, "When the client is not a party to the suit, a party to the suit cannot invoke the privilege," citing Dowie's Estate, 135 Pa. 210.

Jones' Commentary on the Law of Evidence in Civil Cases, Vol. 5, Page 4092, Note 7 says, "But if client is not a party to the cause a stranger may not claim the privilege."

To establish irrebuttably that this is the rule in Pennsylvania, it is set forth as follows: "In a suit between parties the right of the third person to non-disclosure by counsel does not pass to either of such parties," on page 20, Note 59 of "Pennsylvania Law of Witnesses" by William Trickett.

Henry's Pennsylvania Trial Evidence, Page 449, Note 22 states the same.

This rule of law is amply supported by Hamilton vs. Neel, 7 Watts 517, Dowie's Estate, 135 Pa. 210 as well as the recent case of Boyd vs. Kilmer, 285 Pa. 533, decided in 1926.

In Boyd vs. Kilmer 285 Pa. 533 the facts were testator shortly before his death conveyed land to defendant. Plaintiffs, daughters of the deceased, claimed that there was undue influnce. Defendant called the attorney whom the decedent had consulted. Plaintiffs object that this was a privileged communication. Thus we have the question in the case at bar "Can one not a client of the attorney who is testifying, object on the ground of privileged communication when the client is not a party to the suit."

Mr. Justice Frazer answers "Furthermore plaintiffs were not in a position to object to the testimony; they were not parties to the transaction and accordingly without right to claim the communication privileged."

In a litigation between parties the sole object should be to arrive at the truth in as quick and efficient a way as possible by disclosing all evidence. The law has excluded certain communications as privileged. We can see no good reason for extending the rule any further than to a client himself when he is a party to the suit.

The appeal of the defendant is therefore dismissed and judgment must be entered for the plaintiff accordingly.

OPINION OF SUPREME COURT

It will be noted that the rule of privilege is entirely extrinsic to the ascertainment of truth and in fact often constitutes a serious difficulty to the discovery of the truth of the matter in issue. This being the case, what effect has the court's failure to allow the privilege? Manifestly none on the justice of the recovery. It has been held in Pennsylvania that the defendant cannot appeal from the denial of the claim of privilege and the only remedy is for the witness to refuse to answer and appeal from any committment for contempt, Ralph vs. Brown, 3 W. and S. 395. Hence the defendant here could not take an appeal on this ground.

We also believe that the learned court below has correctly ruled that a third person cannot claim the privilege. The judgment is accordingly affirmed.

COMMONWEALTH VS. BUNDY

Murder—Witnesses—Competency—Determination—Husband and Wife—Ruling of Court

STATEMENT OF FACTS

Prosecution for murder. The sole question before the jury was the identity of the defendant with "CHARLES BUNDY" who was admittedly the murderer. The defense called CHARLES BUNDY'S wife as a witness and asked her whether the prisoner was her husband, obviously expecting a negative reply. The Commonwealth objected to her competency on the rule that one spouse cannot testify for or against the other and asked that the Judge make a preliminary decision as to the existence of the marital relationship between the witness and the defendant. The Judge did so and rejected the witness as the wife of the defendant. Verdict was GUILTY. Defendant appeals assigning this action of the Court as reversible error.

OPINION OF THE COURT

Cartwright, J. The Commonwealth in the court below was attempting to prove that the defendant was "CHARLES BUNDY" and therefore guilty of the murder charge placed against him. The only possible way to prove this fact was to prove the identity of the defendant with "CHARLES BUNDY" the admitted murderer by means of persons who knew the aforementioned BUNDY. The best witnesses for this purpose would be those persons who knew BUNDY best, associated with him the most and came in contact with him enough for them to be able to identify him if ever called upon to do so. The best possible witness for this purpose of identification would be the known wife of BUNDY. The Commonwealth for some unexplained reason did not call the wife of the admitted murderer, but the defense did, and the Commonwealth objected on the ground that she was incompetent to testify because she was the wife of the defendant and her testimony would thus be against him which would be in volation of the Act of May 23, 1887, P. L. 158, Sec. 2b.

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The defense expected to prove by this witness the fact that the defendant was not her husband and therefore not the guilty

party. They certainly would not have been so foolish as to put the wife of the guilty man on the witness stand and ask her such a question which might imperil the very life of their client, had they thought for a minute that she was in reality the wife of their client. They most certainly would not have put her on knowing her to be the defendant's wife and ask her such a question, unless they expected her to perjure herself. This court refuses to entertain for one second the thought that the defense attorneys would attempt to do such a despicable thing. To entertain such a thought would be to impute the basest motives possible to these able men. "The one shining glory of our ancient and honorable profession is that every member of it is presumed to possess and practice the highest possible methods," Justice Simpson during an oral argument.

The learned Judge below, as we will show later in this opinion, erred in ruling that the witness was the wife of the defendant. By so ruling, he decided the very question in issue, namely, the identity of the defendant with the admitted murderer. He thus declared him guilty of the crime charged against him without allowing him his constitutional right of a trial by jury.

It is well settled that identity of a person with another person is a question of fact for the jury and neither a question of law nor a preliminary question of fact to be passed on by the court before the admission of the testimony. The identity of the defendant as the person who committed the crime is a question of fact for the jury to determine. **For authority, See:** Commonwealth vs. Ronello 242 Pa. 381, also reported in 251 Pa. 329; People vs. Jackson 182 N. Y. 66; Carleton vs. Townsend 28 Cal. 219; Swicard vs. Hooks 85 Ga. 580, also reported in 11 S. E. 863; O'Laughlin vs. Hammond & Co. 121 N. Y. 699, also reported in 24 N. E. 110; People vs. Rogers 71 Cal. 565; Newton vs. State 15 Florida 610. By reason of the above authorities cited, it can readily be seen that the question of identity is a question of fact for the jury and that the Judge exceeded his authority in refusing to allow the alleged wife to testify as to the identity of the prisoner.

The creditability of all witnesses in all cases is a question for the jury to determine. They can observe the witness on the stand, her manner while there, and arrive at a conclusion as to whether she is telling the truth or not. For authority, See: Enright vs. Pittsburgh Junction R. Co. 204 Pa. 543; Bassett vs. Easton 200 Pa. 514; McClane vs. People's Light, etc., Co. 178 Pa. 424; Crescent Pipe Line Co. 170 Pa. 369.

The question asked the wife of BUNDY being a question solely as to identity of the prisoner and, as such a question of fact to be determined by the jury, it was erroneous to refuse to allow her to

testify as to that fact. The Commonwealth had abundant opportunity to attack her creditability and also to cross-examine her as to the fact of marriage. While it is admitted that a wife cannot testify against her husband except in certain cases, not applicable here, yet this would not be testifying against her husband because she would have shown that the defendant was not her husband else she would not have been called by the defendant to answer that question, and therefore she was competent to answer the question put to her by the defendant.

Judgment reversed and a venire facias de novo awarded.

OPINION OF SUPREME COURT

The case presents several interesting questions for decision. What is the proper procedure where the competency of a witness is attacked and an adverse decision by the court will practically decide the very question in issue? May a witness be permitted to testify when the judge, after a preliminary decision, makes the only evidence the witness may give a falsehood?

There can be no doubt that the question of competency of a witness is usually for the judge to decide, Semple vs. Callery, 184 Pa. 95. The same case holds that it is not error to refuse to allow the jury to decide this question with a warning to disregard the evidence if they find the witness incompetent. Even tho the decision of this question does thereby destroy the availability of the chief witness for that side, no reason can be seen to justify the judge in passing the burden to the jury. So we hold that it was within the province of the judge to decide whether the witness was the wife of Bundy. See also Comm. vs. Mudgett, 174 Pa. 211, 264.

But the wife of a defendant is not incompetent for all purposes. She may testify **for** him, Comm. vs. Weber, 167 Pa. 153. In this case however, the court by deciding that she was the wife of the defendant has made it impossible for her to give any evidence in his favor except that which the court has already determined would be false. Must the court permit her to perjure herself? Is it error not to allow such testimony? If she testifies that she is the wife, she testifies against the husband. If she testifies that she is not the wife, she commits perjury. Surely it cannot be error for the court to refuse to allow evidence which it lawfully has predetermined to be perjury. While the court in its discretion might have adopted the alternative before suggested, it was not error to refuse to do so. The only available case on point is State vs. Lee, 127 La. 1077, 54 So. 356.

The judgment of the learned court below is reversed.

NOTE

The contents of this issue are a reprint of a portion of the contents of the October issue of the Temple Law Quarterly. The reprint is made through the courtesy of the editorial staff of the Temple Law Quarterly. The following is a portion of a prefatory note inserted by said Editorial Board:

"In this first issue of the Quarterly for the school year 1927-28, the Board of Editors is pleased to have the opportunity of first presenting the text of new Supreme Court Rules, designed and adopted to regulate admission to the bar and the study of law, with respect to the moral fitness of applicants, together with discussions explanatory of the subject, by the Chief Justice of Pennsylvania and the Secretary of the State Board of Law Examiners. Although not concerned with the substantive law, these rules are, in our opinion, of the greatest possible importance, and we print them in an effort to lend the circulation of our journal toward bringing the subject to the attention of the profession, with the sincere hope that they will be studied, not with a mere passing interest, but in the serious spirit which produced them, so that their portent may be fully and effectually appreciated.

The Editorial Board"